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THE LIABILITY OF AN UNDISCLOSED PRINCIPAL.

II.

§ 19. *Of the Second Exception — "Election."* — The second exception to the general rule is commonly said to rest upon the theory of "election." A wholly anomalous situation is presented. A contract has been made which in terms binds the agent only. Nevertheless the principal may be made liable upon it. How is he liable? Although the other party may perhaps sue both of them severally but simultaneously, or possibly sue both jointly,[1] the obligation can hardly be deemed a joint one in the sense that it can ultimately be enforced against both.[2] Neither can it be said that both are liable severally in the sense that recovery can be had partly from each. The liability is commonly said to be an alternative one. The agent can be held because he made the contract in his own name, *or* the principal can be held because it is in law deemed his contract. Which one shall be held? The answer ordinarily given is that the other party may "elect" between them. As a corollary to this, it is said that the other party has but one choice; that when he has made his election his determination is final; and he cannot afterwards make a new choice even though his first efforts did not result in a satisfaction of his claim. How far this is true it is now necessary to inquire. Before doing so, it may be well to notice one preliminary matter.

Election properly is a matter of choice. It does not rest upon estoppel. It is not therefore essential in order to make it conclusive that it shall appear to have misled the principal to his prejudice. If, however, it has misled him, — if the principal, being apprised of the fact that the other party has elected to look to the agent, settles with the agent upon that basis and either pays him or allows him a corresponding credit, — nothing could be more unjust than to permit

[1] See cases *post*, § 24.

[2] See Tew *v.* Wolfsohn, *supra;* McLean *v.* Sexton, *supra;* Gay *v.* Kelley, *supra;* Belt *v.* Washington Power Co., 24 Wash. 387; Steele Smith Grocery Co. *v.* Potthast, 109 Iowa 413.

the other party afterwards to repudiate his action with the agent and resort to the principal.[1]

§ 20. *Theories of Election.* — With reference to this matter of election four views are possible: 1. That the other party unexpectedly finds himself in a situation where he can hold one of two parties liable and he must simply choose between them. 2. That the other party, inasmuch as he has a contract in terms with the agent, will presumptively pursue this obligation, and that therefore some affirmative action is necessary to show that he intends to abandon this for his remedy against the principal. 3. That the other party, as soon as he discovers the existence of the principal, will presumptively look to him rather than to the agent, and that some affirmative act is therefore necessary to show that he prefers to hold the agent. 4. That the other party, having actually dealt with the agent as principal and obtained an obligation against him, but finding unexpectedly that he also has a claim against the principal, intends to make the most of the situation, — to keep and enforce his claims against both until he has obtained satisfaction from one of them or has done something which in fact or in law shows that he has abandoned his claim against one or the other of them.

Any one of these views might undoubtedly be taken, but no one of them, in fact, has been consistently held. The field is therefore open for the adoption of the one which seems most consistent with principle and the peculiarities of the situation. That the last is the sound and natural view would seem to require no argument to establish, although it undoubtedly is not election in the ordinary sense. From the standpoint of the liability of the principal it would lead to this conclusion: that no act with reference to keeping alive or enforcing the liability of the agent would discharge the principal unless

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[1] Paterson *v.* Gandasequi, 15 East, 62; Addison *v.* Gandasequi, 4 Taunt. 574; Thomson *v.* Davenport, 9 Barn. & Cress. 78; Horsfall *v.* Fauntleroy, 10 Barn. & Cress. 755; Smyth *v.* Anderson, 7 Com. Bench 21; Irvine *v.* Watson, 5 Q. B. Div. 102; Armstrong *v.* Stokes, L. R. 7 Q. B. 598; Heald *v.* Kenworthy, 10 Exch. 739; Kymer *v.* Suwercropp, 1 Camp. 109; Macfarlane *v.* Giannacopulo, 3 Hurl. & Nor. 860; Clealand *v.* Walker, 11 Ala. 1058; Cheever *v.* Smith, 15 Johns. (N. Y.) 276; Bush *v.* Devine, 5 Har. (Del.) 375; Brown *v.* Bankers, etc. Tel. Co., 30 Md. 39; Schepflin *v.* Dessar, 20 Mo. App. 569; Hyde *v.* Wolfe, 4 La. 234; Homans *v.* Lambard, 21 Me. 308.

One who gives a receipt to a State agent without actual payment cannot afterwards hold the State, although he has given notice to the accounting officers not to allow such receipt as a credit to the agent. Fitler *v.* Commonwealth, 31 Pa. 406.

it also showed that the other party did not intend to charge the principal.

§ 21. *Knowledge necessary.* — Election, as has been pointed out, involves choice, and choice presupposes knowledge of the alternatives and freedom to choose between them. The other party cannot elect between the principal and the agent so long as he does not know that there was a principal in the transaction; and this knowledge must include not only the fact of the agency but the name and identity of the principal.[1] What he may do before that cannot be charged to him as an election.

§ 22. *What constitutes an Election.* — It is impossible to lay down any hard and fast rule by which it can, in all cases, be determined what constitutes an election until there is agreement as to what is meant by election. The other party may, of course, by some express and unequivocal act, done with that direct intent, declare his purpose to treat the agent only as his debtor in such a manner as to leave no room for doubt; but in the majority of the cases the intention of the other party is to be gathered from his words and conduct, and the various circumstances which surround the case. If the case were one of ordinary election, any act which unequivocally indicated a purpose to pursue either the principal or the agent would suffice; but it is quite clear that we are not dealing with an ordinary case at all. This will be evident from a consideration of the cases which have actually been decided, distinguishing between what is done before and what is done after the discovery of the principal.

§ 23. 1. *Before Discovery.* — As has already been pointed out, any act done before knowledge of the principal, unless it amounts to an absolute discharge, extinction, or merger of the debt, cannot amount to such an election to charge the agent as will release the principal when discovered.

Thus it has been held the taking of an agent's promissory note or acceptance for the price of goods sold to him by one who knew he was acting as agent, but who did not know for whom, will not conclude the seller from holding the principal also when subsequently discovered;[2] nor will the fact that the vendor charged the goods to

[1] Greenburg *v.* Palmieri, 71 N. J. L. 83; Steele Smith Grocery Co. *v.* Potthast, 109 Iowa 413; Curtis *v.* Williamson, L. R. 10 Q. B. 57; Merrill *v.* Kenyon, 48 Conn. 314.

[2] Merrill *v.* Kenyon, 48 Conn. 314; Harper *v.* Bank, 54 Ohio St. 425; Pope *v.* Meadow, etc. Co., 20 Fed. 35. "If the vendor on a sale made to an agent take

the agent,[1] or sent him a statement of the account made out in his name,[2] supposing him to be the principal, prevent the vendor from subsequently charging the real principal when ascertained to be such.

The commencement of an action against the agent, before knowledge, cannot be deemed an election;[3] and even the recovery of a judgment against the agent, before discovery of the principal, has been held not to be a bar to an action against the principal when discovered unless he discharges the judgment against the agent.[4] This latter holding may, perhaps, be open to question, not because the recovery of judgment constitutes an election, but upon the ground of merger.[5]

§ 24. II. *After Discovery.* — After knowledge of the existence and identity of the principal comes to the other party, he is in a position to choose between the principal and the agent. All of the aspects of election are at once presented. If it be treated merely as a matter of choice, the question is, When has a choice been indicated? Treating the election in the manner suggested, however, the question becomes: What acts of the other party, in view of the liability of both principal and agent, manifest an intention not to hold the principal? A number of situations have been considered in this connection.

Presenting Claim. — In one case,[6] after the discovery of the prin-

the promissory note of the agent for the amount of the purchase, on failure of payment by the agent the principal would be equally liable to an action by the vendor, founded upon the original consideration, as if the note had been given by the principal himself." Keller *v.* Singleton, 69 Ga. 703.

[1] Yates *v.* Repetto, 65 N. J. L. 294. See also Raymond *v.* Crown, etc. Mills, 2 Metc. (Mass.) 319; French *v.* Price, 24 Pick. (Mass.) 13; Guest *v.* Burlington Opera House Co., 74 Iowa 457.

[2] Henderson *v.* Mayhew, 2 Gill (Md.) 393.

[3] Brown *v.* Reiman, 48 N. Y. App. Div. 295; Ranger *v.* Thalmann, 39 N. Y. Misc. 420; Remmel *v.* Townsend, 83 Hun (N. Y.) 353; Steele Smith Grocery Co. *v.* Potthast, 109 Iowa 413.

[4] Greenburg *v.* Palmieri, 71 N. J. L. 83; Lindquist *v.* Dickson, 98 Minn. 369; Brown *v.* Reiman, *supra.*

[5] This question of merger is not easy to dispose of. How many contracts are there? Is there the visible contract of the agent and another, invisible, contract of the principal? Is there but one contract either of the principal or of the agent at the election of the other party? Is there but one contract upon which principal and agent may be held jointly, as is said in several of the cases cited in a following note? Here are obviously, but in a different form, the same questions arising under the doctrine of election. See the (dissenting) opinion of Lord Penzance in Kendall *v.* Hamilton, 4 App. Cas. 504.

[6] Curtis *v.* Williamson, L. R. 10 Q. B. 57 (1874).

In Jones *v.* Johnson, 86 Ky. 530 (1888), while the creditor had an action pending

cipal, the creditor filed a claim against the estate of the agent who had become insolvent. The proof was sent by mail. "Almost immediately" after this had been posted the creditor's attorneys, fearing that the presentation of this claim might prejudice the demand against the principal, sent a telegram to stop its presentation; but the telegram arrived too late, as the proof had already been filed. Nothing further, however, was done under it and no dividend was ever received. As a mere matter of election, many cases could be imagined wherein the filing of such a claim would be enough. Considered as evidence of an intention not to hold the principal, it could be strongly urged that merely keeping the claim alive against the agent was slight, if any, evidence that the creditor did not intend to follow the principal also. It was held not to be conclusive evidence, as a matter of law, of an intention to treat the agent as the only debtor. The argument was that, as the mere commencement of an action against the agent was not conclusive, the filing of the claim, which was less than the commencement of an action, ought not to be.

Commencement of Action. — As suggested in the preceding case, the mere commencement of an action against the agent, although this act is often regarded as an election in other fields, is not here deemed to constitute a conclusive election as a matter of law,[1] whatever may be its force as evidence of an election as a matter of fact. There is, moreover, as has been seen, authority for saying that principal and agent may be simultaneously sued severally, and possibly even jointly.[2]

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against the principal, he filed a claim against the estate of the insolvent agent and received a small dividend upon it. *Held*, that this did not defeat his action against the principal.

In Hoffman *v.* Anderson, 112 Ky. 893 (1902), the claim was presented first against the estate of the principal and a small dividend received. *Held*, that this did not prevent a subsequent proceeding against the agent.

[1] Ferry *v.* Moore, 18 Ill. App. 135; Curtis *v.* Williamson, *supra;* Raymond *v.* Crown, etc. Mills, 2 Metc. (Mass.) 319; Cobb *v.* Knapp, 71 N. Y. 348.

In Raymond *v.* Crown, etc. Mills, *supra*, the creditor took out a writ against the agent before discovering the principal; before the writ was served he discovered the principal and inserted his name also, and the writ was thus served; later the creditor discontinued as to the agent. *Held*, not as matter of law to defeat the action against the principal.

See also McLean *v.* Sexton, 44 N. Y. App. Div. 520; Tew *v.* Wolfsohn, 77 App. Div. 454; Gay *v.* Kelley, 123 N. W. 295 (Minn.).

[2] In Pollock on Contracts (7 ed., p. 105, Williston's Wald's Pollock, p. 116) it is said: "When it is said that he [the other party] has a right of election, this means that

Prosecuting the action to judgment against the agent, after discovery of the principal, has been held in several cases to constitute an election as a matter of law.[1] As a mere matter of ordinary election this is undoubtedly sound; as a matter of a possible merger it may also be sound; but if election be treated in the manner which has been suggested it cannot well be said that changing the form of the agent's obligation, or putting it into a condition in which it can be more readily enforced, is inconsistent with an intention to proceed against the principal also. Nothing short of satisfaction of the judgment against the agent would then release the principal as a matter of law, and some cases have so held.[2]

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he may sue either the principal or the agent, or may commence proceedings against both but may only sue one of them to judgment; and a judgment obtained against one, though unsatisfied, is a bar to an action against the other."

In McLean *v.* Sexton, 44 N. Y. App. Div. 520 [an action to foreclose a mechanic's lien], it is held that, under the New York code at least, both principal and agent may be sued in the same action. This, however, must be taken in connection with what is there said to be the rule in New York, — that prosecuting the action against either to judgment is not an election.

In Tew *v.* Wolfsohn, 77 N. Y. App. Div. 454, it is said: "Assuming that the plaintiff is only entitled to judgment against one of the defendants, and that he must elect which party he intends to hold, he cannot be required to make that election until the close of the case." This case was affirmed in the Court of Appeals, Tew *v.* Wolfsohn, 174 N. Y. 272, though that court declined to treat it as a case of undisclosed principal. The dissenting opinion of Cullen, J., discusses the general question quite fully.

In Gay *v.* Kelley, 123 N. W. 295 (Minn.), it is held that while prosecuting the action to judgment against one of the parties would be an election, where done with full knowledge, still where the alleged principal denies that he was such, the other party may join both in one action, and cannot be compelled to elect until the close of the testimony.

In Coaling Co. *v.* Howard, 130 Ga. 807, a joint action against several principals, only one of whom was disclosed at the time of contracting, was permitted. There was no discussion of the question.

[1] Priestly *v.* Fernie, 3 H. & C. 977 (1865); Kingsley *v.* Davis, 104 Mass. 178 (1870); Tuthill *v.* Wilson, 90 N. Y. 423; *per* Lord Ch. Cairns in Kendall *v.* Hamilton, L. R. 4 App. Cas. 504; Sessions *v.* Block, 40 Mo. App. 569; Lindquist *v.* Dickson, 98 Minn. 369; Codd Co. *v.* Parker, 97 Md. 319; Ousterhout *v.* Day, 9 Johns. (N.Y.) 114.

[2] Beymer *v.* Bonsall, 79 Pa. 298. This is said to be the rule in New York: McLean *v.* Sexton, 44 N. Y. App. Div. 520; Tew *v.* Wolfsohn, 77 N. Y. App. Div. 454; largely upon such approval of Beymer *v.* Bonsall as is to be found in Cobb *v.* Knapp, 71 N. Y. 348, and First Nat. Bank *v.* Wallis, 84 Hun (N. Y.) 376, neither one precisely in point. Maple *v.* Railroad Co., 40 Ohio St. 313, so holds, but it was an action of tort.

As strong a statement, probably, as has been made against this view is that of Lord Chancellor Cairns in Kendall *v.* Hamilton, 4 App. Cas. 504 (a case of partnership). He said: "Now, I take it to be clear that, where an agent contracts in his own name for an undisclosed principal, the person with whom he contracts may sue the agent,

Taking Agent's Note. — The effect of taking the agent's promissory note or bill of exchange, after the discovery of the principal, for a debt contracted before, is involved in some uncertainty. If the paper be expressly taken as payment, no question could ordinarily arise. In a few states the paper is presumptively taken as payment, and would ordinarily release the principal.[1] In the majority

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or he may sue the principal, but if he sues the agent and recovers judgment, he cannot afterwards sue the principal, even although the judgment does not result in satisfaction of the debt. If any authority for this proposition is needed, the case of Priestly *v.* Fernie, 3 H. & C. 977, may be mentioned. But the reasons why this must be the case are, I think, obvious. It would be clearly contrary to every principle of justice that the creditor who had seen and known and dealt with and given credit to the agent, should be driven to sue the principal if he does not wish to sue him, and, on the other hand, it would be equally contrary to justice that the creditor on discovering the principal, who really has had the benefit of the loan, should be prevented suing him if he wishes to do so. But it would be no less contrary to justice that the creditor should be able to sue first the agent and then the principal, when there was no contract, and when it was never the intention of any of the parties that he should do so. Again, if an action were brought and judgment recovered against the agent, he, the agent, would have a right of action for indemnity against his principal, while, if the principal were liable also to be sued, he would be vexed with a double action. Farther than this, if actions could be brought and judgments recovered, first against the agent and afterwards against the principal, you would have two judgments in existence for the same debt or cause of action; they might not necessarily be for the same amounts, and there might be recoveries had, or liens and charges created, by means of both, and there would be no mode, upon the face of the judgments, or by any means short of a fresh proceeding, of showing that the two judgments were really for the same debt or cause of action; and that satisfaction of one was, or would be, satisfaction of both."

The opinion in Beymer *v.* Bonsall, 79 Pa. 298, which is the leading case on the other side, is very brief and was *per curiam.* The court said: "Undoubtedly an agent who makes a contract in his own name without disclosing his agency is liable to the other party. The latter acts upon his credit and is not bound to yield up his right to hold the former personally, merely because he discloses a principal who is also liable. The principal is liable because the contract was for his benefit, and the agent is benefited by his being presumably the creditor, for there can be but one satisfaction. But it does not follow that the agent can afterwards discharge himself by putting the creditor to his election. Being already liable by his contract, he can be discharged only by satisfaction of it, by himself or another. So the principal has no right to compel the creditor to elect his action, or to discharge either himself or his agent, but can defend his agent only by making satisfaction for him."

In McLean *v.* Sexton, 44 N. Y. App. Div. 520, after quoting with approval the rule in Pollock's Contracts that the other party may sue either principal or agent or may commence proceedings against both, but may sue only one of them to judgment, it is said: "If they may be sued in separate actions, there is no good reason why both the principal and agent who are liable for a debt should not be sued in the same action. Both will be discharged by the satisfaction of the debt, and neither can be discharged without it."

[1] Paige *v.* Stone, 10 Metc. (Mass.) 160; Wilkins *v.* Reed, 6 Greenl. (Me.) 220;

of the states, however, the paper is not presumptively payment, and such a conclusion would not follow.[1] In a case[2] in Massachusetts, where a note is presumptively payment, the court said:

"If the plaintiff, knowing O. to be the agent of the defendant, accepted his note in payment for property sold to the defendant, intending to receive it as payment and to give exclusive credit to O., it would operate as payment; and he could not thereafter fall back upon the defendant for the price of the property, although the note of O. should be dishonored."

This, however, was not a case of undisclosed principal at all, but of election between a known principal and a known agent tendering his individual responsibility, — a case which may be analogous but is not identical. In a similar case[3] in Missouri, where a note is held to be not presumptively payment,[4] it was said that

"where the creditor with knowledge of the principal's liability sees fit to take the individual note of the agent, without taking, at the time of the transaction, any steps indicative of an intent to hold the principal, this is equivalent to a discharge of the principal as a matter of law."

Considering that these two rules were inconsistent, the court in a later case suggested that the conclusion in the agency case might perhaps be regarded as an exception to the previous more general rule.[5]

On the principle of election suggested, while the taking of the agent's note may have some effect as evidence, it is difficult to see why, unless actually taken as payment, it should operate as matter of law to discharge the principal.

Charging Goods to Agent. — *A fortiori* would there be no release merely because the goods were charged, or a bill made out, to the agent after the discovery of the principal.[6]

French *v.* Price, 24 Pick. (Mass.) 13; Green *v.* Tanner, 8 Metc. (Mass.) 411; Chapman *v.* Durant, 10 Mass. 47; Tudor *v.* Whiting, 12 Mass. 212.

[1] See Atlas S. S. Co. *v.* Colombian Land Co., 42 C. C. A. 398, where the question is fully discussed though the case was not really one of undisclosed principal; Rathbone *v.* Tucker, 15 Wend. (N. Y.) 498; Muldon *v.* Whitlock, 1 Cow. (N. Y.) 290.

[2] Perkins *v.* Cady, 111 Mass. 318.

[3] Ames Packing & Prov. Co. *v.* Tucker, 8 Mo. App. 95.

[4] Commiskey *v.* McPike, 20 Mo. App. 82.

[5] Schepflin *v.* Dessar, 20 Mo. App. 569.

[6] Dyer *v.* Swift, 154 Mass. 159; Gardner *v.* Bean, 124 Mass. 347; Rodliff *v.* Dallinger, 141 Mass. 1.

§ 25. *Intermediate Party must have been Agent and not Principal.* — Where it is sought to hold one as undisclosed principal, for example for goods bought, it is essential that the intermediate party through whom the goods were secured shall have been an agent of the principal sought to be held and not his vendor.[1] Thus, for illustration, if A orders goods of B as seller, but B, not happening to have them on hand, buys them in his own name of C and supplies them to A, A will not be liable to C as undisclosed principal if B fails to pay C. A would not be liable to C in such a case if he had been disclosed. There was no agency and no principal disclosed or undisclosed.

The same doctrine would, of course, apply to other cases than the sale of goods, — to leasing, borrowing, employing, and the like.

§ 26. *Alleged Agent must have been really such.* — It must be kept in mind that the rules here considered contemplate the actual existence of authority from a principal, though he be not disclosed.[2] There is no more warrant for holding an undisclosed party liable for acts which he did not authorize than there is for holding a disclosed party in such a case. In fact there is often much less warrant. It is therefore an indispensable part of the plaintiff's case to show that the alleged principal was really such.

It must also usually appear that the fact that the undisclosed principal was undisclosed was not in violation of his authority or consent. An authority to buy goods, for example, in the principal's name and upon his credit only, can ordinarily not be deemed to warrant a purchase in the agent's name and upon his credit. It is, of course, true that custom or the distinction between instructions and authority[3] may affect the matter, but in the absence of some element of that nature the rule must be as stated.

Where goods are bought upon credit, it must also be usually a part of the plaintiff's case that a purchase upon credit was authorized, subject to the qualifications mentioned in the preceding paragraph. A principal who supplies an agent with funds with which to buy and pay for goods cannot, it is held, ordinarily be made liable where the

[1] See Stoddard *v.* Ham, 129 Mass. 383.

[2] Moline *v.* Neville, 38 Neb. 433; Harper *v.* Sinclair, 7 Wash. 372.

[3] Thus, in the converse case, it is held that the principal may be liable, although he instructed the agent to buy in his (the agent's) own name, the seller being ignorant of the special instructions. Perth Amboy Mfg. Co. *v.* Condit, 21 N. J. L. 659. See also Calder *v.* Dobell, L. R. 6 C. P. 486.

agent, concealing the principal, buys the goods upon his own credit and makes some other disposition of the money.[1]

Moreover, there can ordinarily in such a case be no ratification of which the other party may avail himself, in view of the rule denying ratification by an undisclosed principal.

§ 27. *"Apparent" Authority.* — Granting that an agency actually exists, it is held that the usual incidents attach to it, and, among others, that the undisclosed principal is liable for acts which fall within the usual scope of such an agency, even though the principal may have given private instructions to the contrary. Thus where the defendants put an agent in charge of their business to be carried on in his own name, and gave him authority to buy certain classes of goods but instructed him not to buy other classes which they would furnish themselves, it was held that defendants were nevertheless liable to the plaintiff for the price of goods of the forbidden class bought by the agent, although the plaintiff at the time of the sale knew nothing of the agency and supposed the agent to be the principal.[2] Wills, J., said:

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[1] Laing *v.* Butler, 37 Hun (N. Y.) 144; Fradley *v.* Hyland, 37 Fed. 49.

[2] Watteau *v.* Fenwick, [1893] 1 Q. B. 346.

Edmunds *v.* Bushell, L. R. 1 Q. B. 97, was relied upon, where Cockburn, C. J., said: "If a person employs another as an agent in a character which involves a particular authority, he cannot by a secret reservation divest him of that authority."

Watteau *v.* Fenwick is followed in Brooks *v.* Shaw, 197 Mass. 376.

A similar conclusion had previously been reached in Hubbard *v.* Tenbrook, 124 Pa. 291 (1889). In this case an agent had been put forward to manage a business apparently as owner but with instructions not to buy goods on credit. He did so buy of plaintiff, and his principal was held liable. Mitchell, J., said: "We have thus the question presented whether an agent can be put forward to conduct a separate business in his own name, and the principal escape liability by a secret limitation on the agent's authority to purchase. The answer is not at all doubtful. A man conducting an apparently prosperous and profitable business obtains credit thereby, and his creditors have a right to suppose that his profits go into his assets for their protection in case of a pinch or an unfavorable turn in the business. To allow an undisclosed principal to absorb the profits, and then when the pinch comes, to escape responsibility on the ground of orders to his agent not to buy on credit, would be a plain fraud on the public. No exact precedent has been cited. None is needed. The rule so vigorously contended for by the plaintiff in error that those dealing with an agent are bound to look to his authority is freely conceded, but this case falls within the equally established rule that those clothing an agent with apparent authority, are, as to parties dealing on the faith of such authority, conclusively estopped from denying it."

Hubbard *v.* Tenbrook was followed in McCracken *v.* Hamburger, 139 Pa. 326; Ernst *v.* Harrison, 86 N. Y. Supp. 247; Lamb *v.* Thompson, 31 Neb. 448; Patrick *v.* Grand Falls Merc. Co., 13 N. Dak. 12. Napa Valley Wine Co. *v.* Cassanova, 122

"Once it is established that the defendant was the real principal, the ordinary doctrine as to principal and agent applies — that the principal is liable for all the acts of the agent which are within the authority usually confided to an agent of that character, notwithstanding limitations, as between the principal and the agent, put upon that authority. It is said that it is only so where there has been a holding out of authority — which cannot be said of a case where the person supplying the goods knew nothing of the existence of a principal. But I do not think so. Otherwise, in every case of undisclosed principal, or at least in every case where the fact of there being a principal was undisclosed, the secret limitation of authority would prevail and defeat the action of the person dealing with the agent, and then discovering that he was an agent and had a principal."

A number of other cases have adopted similar views, as will be seen from the note.

This doctrine, however, has been severely criticised,[1] and it can

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N. W. 812 (Wis.); Mississippi Valley Const. Co. *v.* Abeles, 87 Ark. 374; and Allison *v.* Sutlive, 99 Ga. 151, are to the same effect.

[1] For example, by Mr. Ewart in his book on Estoppel, pp. 246–248; by the Solicitor's Journal, vol. 37, p. 280. It is doubted in 9 Law Quarterly Review, p. 111.

The court in Watteau *v.* Fenwick did not cite, or apparently have their attention called to, Miles *v.* McIlwraith, 8 App. Cas. 120 (1883), and although the precise issue was not the same the general question was similar, and there is much in the opinions in the cases not easy to reconcile. Miles *v.* McIlwraith was an action for a penalty brought under a statute imposing penalties upon any one who being in the public service should be interested in a public contract. Defendant was a member of a colonial legislature. The colony was about to lease boats. Defendant was part owner of a number of steamships for which a certain firm (the agents herein) were agents. This firm proposed to offer boats to the government, and, in order not to involve defendant, he required the agents not to offer any ships in which he was interested as part owner. With reference to one ship in particular it was agreed that the agents should lease her at a rent independent of any they might obtain on a lease to the government. In violation of the directions the agents leased this ship to the government on behalf of the owners and in such form as would bind defendant as one of them. The colonial agent who acted for the government did not know of defendant's connection with the boat. It was contended that defendant had violated the statute and was subject to the penalty. But it was held that as defendant would not have been liable to the government (since the agents violated the instructions and there was no apparent authority to bind the defendant, as he was unknown) the defendant was not amenable to the statute. A distinction may be made here upon the ground that the business done was not so done with the consent of the alleged principal.

In Becherer *v.* Asher, 23 Ont. App. 202 (1896), Watteau *v.* Fenwick and Miles *v.* McIlwraith were considered, and it was held that undisclosed principals who had employed an agent to carry on business (in a store rented by him) for the sale of their goods in his name (his authority being limited to the sale of goods supplied by his principals and his compensation being what he obtained for them above invoice prices), were not liable for goods purchased by him in his own name and which he added to

clearly not be sustained upon the ordinary principles of estoppel. It has been thought by some to be merely one more extension of a confessedly anomalous principle; but if the doctrine of the liability of an undisclosed principal is to be adopted at all, there seems to be no unreasonable extension of it in holding that if a principal actually puts forward an agent to act as ostensible principal in a certain position, he should be held responsible for all the acts which such a position usually and naturally justifies, regardless of what his private instructions may have been. The doctrine of necessary and usual powers does not rest upon estoppel.

§ 28. *Excluding Principal's Liability by Terms of Contract.* — In Humble *v.* Hunter,[1] where by the terms of the contract, one who was actually an agent but ostensibly a principal described himself in a charter-party as the owner, it was held that the undisclosed principal could not sue upon the contract. Lord Denman said, "You have a right to the benefit you contemplate from the character, credit, and substance of the party with whom you contract." In Kayton *v.* Barnett[2] it was held that the undisclosed principal could be held, even though, at the time of making the contract, the plaintiff had inquired if the defendant was really the buyer and had declared that he would not sell the goods if that was the fact. Notwithstanding this declaration, said the court, the plaintiff did in fact sell the goods to the defendant, although he did not know that he was doing so; and it did not now lie in defendant's mouth to assert that he was not liable because he had succeeded in inducing the plaintiff to do that which he did not intend to do. This case does not fall within Lord Denman's reason, because the plaintiff here was not deprived of any benefit which he may have contemplated from the personality of the party with whom he ostensibly dealt, — he still had that, and the only question was whether he might also avail himself of the fact that defendant was the principal.

But other questions arise. May the terms of the negotiation be used

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the stock in the store. Watteau *v.* Fenwick was distinguished on the ground that there the agent had authority to purchase certain goods though he was instructed not to buy any of the sort which he did buy, but here he had no authority to buy any goods at all. One of the judges said he thought that Watteau *v.* Fenwick was well decided; another said, "It has been sharply criticised, and, it would seem, not without reason."

[1] 12 Q. B. 310. Compare Schmaltz *v.* Avery, 16 Q. B. 655; Sharman *v.* Brandt, L. R. 6 Q. B. 720; Harper & Co. *v.* Vigers, [1909] 2 K. B. 549. Humble *v.* Hunter is followed in Moore *v.* Cement Co., 121 N. Y. App. Div. 667.

[2] 116 N. Y. 625.

to show that the real agent was not dealt with as an agent at all, but was the actual as well as the ostensible principal? If so, there was no agency and no undisclosed principal, and hence no room for the application of the doctrine under consideration.[1] Suppose, also, that in a formal contract it is made a term that no undisclosed person shall acquire rights or be subject to liability thereon. May it afterward be asserted that there was, nevertheless, an undisclosed principal who may be made liable?

§ 29. *Other Questions.* — Several other questions may be raised which it is not within the scope of this paper to discuss. Suppose that, before the principal is discovered, the agent has performed the contract in whole or in part, but that such performance is not as beneficial to the other party as performance by the principal would be. May the other party, by repudiating, and restoring what he has received, now call upon the principal to perform? Suppose that, before the principal is discovered, the other party and the agent have united to cancel the contract. May the other party, lapse of time and change of position not being involved, now insist upon performance by the principal? Suppose that for some reason personal to the agent, *e. g.*, a prohibitory statute, the contract as made is unenforceable against the agent but would be enforceable against the principal. May the other party enforce the contract against the principal? In an action against the principal may he avail himself of defenses of which the agent might have taken advantage if the action had been brought against him?

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[1] This is apparently the view of the lower court in Kayton *v.* Barnett, 54 N. Y. Super. Ct. 78.